

P. Rob^t & Wm Strangs &c^o

July 8. 1766.

10th July 1766.

*Refuse as
to general
point*

Unto the Right Honourable the Lords of Council and Session,

T H E

P E T I T I O N

O F

Robert and William Strangs, James Dykes, Robert Gilmour, Robert Lindsay, Robert Baird, Robert Steven, and Thomas Gilmour, portioners of Jacktown; John Steven, Andrew Couper, Robert Strang, and Robert Baird, portioners of Newlands; and James Shaw portioner of Croshouse, part of the lands of Allartown,

Humbly sheweth,

THAT the petitioners stand respectively infest in certain parts of the lands of Jacktown, Newlands, and Allartown, holding of Sir William Maxwell of Calderwood, for payment of the feu-duties and performance of the other prestations specified in their several charters; each of which contains a clause of the following tenor. "Et cum astrictis multuris molendino meo, constructo aut construendo, infra viginti libratas terrarum mearum de Dripis et Jacktown, mei molendini solvi solitis et consuetis."

That several differences having arisen betwixt the petitioners and their superior Sir William Maxwell, mutual declarators were raised and insisted in; and a proof having been led, and

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a state prepared, your Lordships, upon the 1st of August 1765, pronounced an interlocutor, which, in so far as relates to the extent of the astringency, the only point now in dispute, was expressed as follows. " Find, That as the teind payable to the college of Glasgow is payable in rental-bolls of meal, therefore that the oats for said meal must be grinded at the pursuer's mill; and that the same is liable to pay intown mul-
" ture."

The petitioners reclaimed against this interlocutor, and your Lordships, upon advising their petition, with answers for Sir William Maxwell, pronounced a judgment, upon the 27th of November 1765, in favour of the petitioners, by finding, that the teinds of their lands were not astringed to Sir William Maxwell's mill.

Sir William Maxwell preferred a petition in his turn; and answers being put in for the now petitioners, your Lordships pronounced another interlocutor, upon the 26th of June last, in the following terms. " Find, That the petitioners vassals, the respondents in this cause, are not intitled to any deduction from their thirlage to the petitioners mill on account of the teind; and remit to the Lord Ordinary in the cause to proceed accordingly."

This question is of some consequence to the petitioners, and is of very considerable importance in point of precedent. They hope, therefore, to be forgiven for taking the liberty that the forms of the court allow them, of bringing the case once more under your Lordships deliberation.

Before entering into any argument, it will be proper to recall to your Lordships remembrance the footing upon which the teinds of the petitioners lands stand. They belong to the college of Glasgow; and as no valuation has been sued for, the college is in use of uplifting them in meal conform to an old rental. But this custom of accepting a certain quantity of meal in place of the *ipsa corpora*, does not proceed in consequence of any perpetual or permanent agreement; for the college

college is in use to execute an inhibition yearly at the church-door of the parish within which the lands lie, and the petitioners find it necessary to apply to the college-factor to continue satisfied with the former use of payment.

Such being the situation of the petitioners tithes, they humbly apprehend, that the clause of astriction above inserted cannot be construed so as to comprehend them.

For, in the *first* place, As no person can astrict to a mill what does not belong to himself, and what he has no power over, it must necessarily follow, that an astriction of lands to a mill will not comprehend the tithes of these lands within the thirlage, unless prior to the astriction they belonged, either to the heritors whose lands are astricted, or to the proprietor of the mill.

This doctrine, as it is obviously founded upon principles, so it is expressly laid down by Lord Stair, *book 2. tit. 7. § 17.* where he expresses himself thus. "Thirlage of lands to another man's mill, doth not infer a thirlage of the teinds of these lands, though acquired by the heritor who thirled the lands." And to confirm this his opinion, the Noble author cites a decision, July 27. 1635, Laird of Innerwick *contra* Hamiltons; where it was expressly found, "That the teind being excepted *de sua natura*, and by the custom and practice of the kingdom, out of the astriction, the acquiring of the same by the person thirled, altered not the thirlage." A like judgment was pronounced in the case of Robert Garden *contra* Thomas Watson, 18th November 1697. In that case the thirlage was of *omnia grana crescentia*; and Lord Fountainhall reports the judgment of the court in the following words. "In this cause deduction being sought for horse-corn and teinds, the Lords allowed the same where the right of the teind was not in the heritor's person." And in two other cases, the one collected by Durie, 21st March 1637, Cuthbert against the Town of Inverness, and the other by Lord Stair, 7th June 1676, Pittarrow *contra* Stewart, teinds were

were found to be a deduction, without distinguishing whether they belonged to the owners of the astricted lands or not. But it is needless in this case to found upon precedents, seeing that Sir William Maxwell himself has admitted, that neither his predecessors, nor the predecessors of his vassals, could thirl the teind, so far as the interest of the college is concerned, or hurt the right of the college to draw the *ipsa corpora*. But then he contends, That though they could not thirl the teind itself, yet it was in their power to thirl the possessor of the teind; and that the constant usage of the vassals in bringing their whole corns to his mill, shows, that at the time of the astriction an obligation was laid upon them to grind at that mill their whole corns, as long as they were allowed to possess and intromit with the teind.

The petitioners will be allowed to say, that this is a very extraordinary kind of a right that is here supposed to be created in favour of their superior. They can understand a temporary astriction by a wadsetter, a liferenter, or a tacksmen, thirling the lands in his possession during the subsistence of his wadset, liferent or tack; for a thirlage of that kind, tho' temporary, is fixed and certain, and is no wise dependent upon the will of a third party: but, in the present case, Sir William Maxwell admits, that it is in the power of the college to render the supposed astriction of the teind altogether elusory and ineffectual whenever they think proper.

The petitioners think it unnecessary to inquire, whether such a strange sort of right as is here supposed could be created; but they will venture to say, that an agreement of that kind ought by no means to be presumed; and that the only natural construction of the clause in the petitioner's charters, expressed in the general terms above stated, is, that the parties meant to thirl the whole of the stock; but that they never thought of the teinds, which were the property of neither the one nor the other. Teinds are considered as a *separatum tenementum*, distinct from the stock. They do not pass as part and pertinent, but must

must be expressed. Sir William Maxwell's predecessor was proprietor of the stock only; and therefore, when he feued out that stock to his vassals, and in the same grant astricted them to his own mill, in sound reason and construction no more can be understood to have been meant to be astricted than the subjects feued, as it was not in his power to carry the astriction further. Nor is it of any consequence that the petitioners and their predecessors have been in the use of bringing their whole corns to their superior's mill; such usage could never have a stronger effect, than if there had been an express constitution of a thirlage; and yet in some of the cases above mentioned it was found, that even where there was a thirlage of *omnia grana crescentia*, the teinds under the foresaid circumstances did not fall under the astriction. It was natural for vassals to bring the whole corns they had occasion to grind to the mill of their superior; but as the thirlage, by its constitution, did not extend to the teinds, which are *de sua natura* excepted, their coming to the mill, in so far as respected the teinds, was *res merae facultatis*; and however long continued, could not be sufficient to extend the thirlage.

It was said for Sir William Maxwell, That when the thirlage of the petitioners lands was constituted, the persons thirled did not deliver the *ipsa corpora* of the tithes to the titular, but were only bound in lieu thereof to pay a certain number of bolls of meal; and that in such circumstances it was not unnatural to come under an astriction of *omnia grana crescentia*, and to agree to bring the whole of their corns to the mill of the superior.

The constitution of the thirlage in question appears to be of a very old date; so that it is quite uncertain how, or in what manner, the teinds were levied at that period, whether by drawing the *ipsa corpora*, or by accepting a certain number of rental-bolls. At the same time it is altogether immaterial: for, as it must be admitted, that the delivering of rental-bolls could not prevent the titular from insisting to draw the *ipsa corpora* when he thought proper,

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proper, it is no wise natural to imagine that a thirlage would be constituted, which it was in the power of a third party the very next day to render altogether ineffectual.

It has been likewise said, That as the teinds for time immemorial have been paid in rental-bolls, these would fall to be the rule for fixing the value of the tithes in a process of valuation: That this being the case, there is in effect a valuation of the petitioners teinds, which are ascertained to amount to a certain number of bolls of mea!; and that therefore there can be no reason for making any exemption from the thirlage on account of the teinds.

But not to mention, that the college has it still in its power to draw the *ipsa corpora*, which must have the effect to defeat the astringtion pleaded for by Sir William Maxwell, your Lordships will observe, that at the date of the constitution of this thirlage, no such thing was known in the law as a valuation of teinds; and therefore, as at the date of the astringtion, the teinds of the lands in question neither were, nor could be valued, an after valuation could not extend or enlarge the astringtion, without some new act or deed upon the part of the heritor, which, in this case, is not so much as alledged.

But, further, the petitioners can by no means agree, that where the use of payment has been by rental-bolls, these must be the rule in valuations, or that such use of payment cannot be departed from at the pleasure either of the titular or the heritor. It has indeed been found, and particularly in the cases of Lenox against tenants, 22d March 1626, and college of Glasgow against Stewart, 20th February 1633, That the use of payment of rental-bolls must be continued as the rule between the titular and the heritor until one or other of them intimate a contrary resolution; but these decisions clearly imply, that how soon the titular or heritor should intimate a contrary resolution, the use of payment of rental-bolls could no longer be the rule.

It is also true, that the statute 1633 hath said, That where teinds are valued apart and severally, there shall be a deduction
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of one fifth, commonly called *the King's ease*. But from thence it will not follow, that rental-bolls are to be the rule in the valuation, unless it proceeds by the agreement of parties: For the case in the view of the statute, when speaking of tithes valued apart or severally, is where the practice has obtained of drawing the *ipsa corpora* of the tithes, and where the value is to be fixed by a proof of what has been drawn for seven years back.

The petitioners only know of two cases where the precise question has been agitated in this court, and both of them were determined agreeably to what is now pleaded for the petitioners. The one was between the college of Glasgow and Sir John Maxwell; where it was found, that the use of payment of rental-bolls did not exclude a valuation of tithes by the present rent. The other was between the Earl of Morton and Captain Stewart of Duncarn; in which, after the court had refused to approve of a report of sub-commissioners, on account of dereliction, and a contrary use of payment, it was pleaded, That the tithes should be valued agreeably to the use of payment by an old rental, with a deduction of a fifth part for the King's ease: but the court found, that neither party was bound by the old rental longer than they thought proper; and that the valuation of the tithes must proceed upon a proof of the present rent.

If more authorities were necessary, Sir William Maxwell has afforded one himself in this case; for in a certificate produced by him, and granted by the factor of the college of Glasgow, for ascertaining, that the petitioners did pay meal for their teind, the west end of Jacktown is mentioned as having formerly paid twelve bolls of meal, and L. 8 : 6 : 8 of vicarage, to which there is added these words: "But now these lands of West End pay neither teind-meal nor vicarage to the college; but in place thereof, L. 58 : 16 : 4 Scots yearly, by a decret of valuation lately obtained."

Such being the case, the payment of rental-bolls hitherto made to the college can have no influence upon the question: for as the college may still insist to draw the *ipsa corpora* until a valuation

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tion be brought; so it is in the power either of the college, or of the petitioners, by insisting in such process, to have the teind ascertained at a fifth part of the rent; and as, in the one case, the superior's pretended thirlage would be altogether defeated; so there appears no reason why it should be supposed to take place in the other case, when the natural consequence of such supposition must be to compel the petitioners to grind their oats into meal at a considerable expence, when they might perhaps be able to gain more profit to themselves by raising the money necessary to pay the teinds, by selling these oats ungrinded.

This leads the petitioners to offer a distinction to your Lordships, and to submit, whether, even supposing the clause of a restriction, and the use of carrying all their corns to the superior's mill, should imply an agreement upon the part of their predecessors, that the teind in their possession should likewise be subject to the thirlage as long as they should continue to pay for that possession rental-bolls in meal; it can be so far extended as to imply, that the whole of their corns should be carried to the mill, altho the teind-duty should come to be paid in money. It might perhaps appear reasonable to the parties at the time, while it was necessary to grind in order to pay the titular, that the corn to be grinded for that purpose should be carried alongst with the stock to the superior's mill; but it is somewhat violent, to create by implication an obligation to carry their corns to a mill, whether it is necessary for them to have them grinded or not. Were the college to draw the *ipsa corpora*, it would be impossible for the petitioners to grind the teind of their corns: the same would happen were the college and the petitioners to agree, that, in place of meal, a certain number of rental-bolls of oats should be paid for the teind: and if, instead of either the one or the other method, a certain sum to be paid for ever after in name of teind-duty, shall be established by a valuation brought at the instance of the college, or the petitioners; it seems somewhat incongruous, that, this notwithstanding, the petitioners should be bound to carry the teind of their corns to the superior's mill, although nowise

nowise necessary, in order to enable them to satisfy the titular, to grind a single peck.

The petitioners, however, by stating this distinction to your Lordships, do by no means intend to admit, that while they continue the use of payment by rental-bolls of meal, they are under any obligation to carry these bolls to the mill of their superior. As the titular is intitled to draw the *ipsa corpora*, and to sell the same without subjecting the purchaser to the thirlage, it is not easy to assign a reason why a different rule should take place, if the titular, in place of drawing the *ipsa corpora* of the tithes, should make a bargain yearly with the heritors. This is in effect and in substance the same as if the titular had first drawn the *ipsa corpora* of the tithes, and should then have sold them to the respective heritors for the compounded sums.

And here the petitioners must beg leave to put your Lordships again in mind of the decisions formerly mentioned, where it was found, that an heritor's acquiring right to his teinds did not cause them to be comprehended within the thirlage. The principle upon which these decisions proceeded was, That teinds were excepted *de sua natura*; and if this principle be just, it must apply to every case, both where the teinds can be purchased, and where the heritor can only obtain a valuation. Could the petitioners compel the titular to sell them their teinds, an end would be put to the superior's claim; and they are at a loss to discover, why the circumstance of their not having it in their power to force a sale, should put them in a worse situation; the agreement they yearly make with the college-factor being in reality a purchase at a certain price of the *ipsa corpora* of the tithes, which the college is intitled to draw, and which, according to Sir William Maxwell's own admission, and to the principles of the decisions above mentioned, could not be subjected to the thirlage, but must be understood to be excepted therefrom *de sua natura*.

The petitioners will now proceed to take some notice of two or three decisions that have been appealed to by Sir William Maxwell.

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The first case mentioned was that of Nicolson *contra* feuers of Tillicultry, 14th January 1662; which is thus stated by Lord Stair. "The defenders alledged *absolutor*, for as much of the
 " corns as would pay the feu-duties, ministers stipends, and all
 " public burdens; because they behoved to sell corns for satisfy-
 " ing of these; and, in so far, the corns were not their own;
 " and so they could pay for no more corns than their own: nei-
 " ther could they be liable for dry multure, unless it were con-
 " stitute by writ; especially seeing the charger libels, not upon
 " the defender's infestment or bonds of thirlage, but upon his
 " own infestment only generally, as infest in the mill of the
 " barony. The Lords repelled these alledgeances; and sustained
 " the decret for all the corns, except seed, horse-corn, and
 " teind, which tholed not fire and water within the thirl."

But this decision imports no more than that, when the teind is *de facto* grinded within the thirl, it must pay the thirlage-duties. There is nothing in it from whence it can be inferred, that he was under any obligation to grind the teinds at the mill; on the contrary, it rather seems to suppose, that he was at liberty to grind or not as he pleased.

The same observation applies to the second decision quoted upon the part of Sir William Maxwell, *viz.* 8th January 1662; James Stewart *contra* feuers of Aberbadnoch. And with regard to the case mentioned by Marcus, *vace* Multure, N^o 723. where it was found, that when teind is not drawn or paid in *ipsis corporibus* to the titular or tacksmen, but in money, it should be liable to multure as the stock, the petitioners will only observe, that the case is so shortly stated, that it does not appear, whether, at the time of the constitution of the thirlage, the teinds had not been valued, and converted into money, either by a decree of valuation, or by the consent and agreement of parties; and it is reasonable to presume, that such has been the case, as otherwise the decision seems contrary to the sound and substantial principles of law.

The only other decision quoted upon the part of Sir William Maxwell

Maxwell was, in the case of Grierfon *contra* Gordon, 21st January 1681; where, in a process of abstracted multures, it being alledged for the defender, that the fifth part of the grain must be free for the teind, the Lords found an offer to prove, that the whole grain growing upon the defender's land, without any abatement for teind, paid multure, a relevant reply. But as this case is likewise very shortly collected, it does not appear, but that the defender may have had a right to his own tithes, or the titularity may have been in the proprietor of the mill; in either of which cases, the teind would fall to be astricted as well as the stock.

Upon the whole, the petitioners apprehend, that their plea is established upon clear and solid grounds. It is admitted, that the teinds themselves neither are, nor could be thirled, it being still in the power of the titular to draw the *ipsa corpora*: and if that is so, it is not easy to conceive how Sir William Maxwell can avail himself of any private bargain betwixt the petitioners and the titular, whereby they are allowed to draw the *ipsa corpora*, and dispose of them for their own use, upon paying to the titular a certain quantity of victual, or a certain sum of money. It does not appear from the clause of astriction, that the petitioners predecessors did agree to subject the teind to the thirlage while they should continue in the possession, or that either of the parties had any such thing in view; and it would be somewhat violent, in the petitioners apprehension, to impose an obligation of that sort upon them, by implication, or upon presumptions, drawn from their being in the use of carrying their whole corns to the superior's mill in time past; which was a *res mere facultatis, cui nunquam præscribitur*. Thirlage might be extremely useful in former ages, when it was necessary to encourage people to erect mills; but now that this country is so much improved in that and in many other respects, it is far from being necessary, and is often somewhat grievous; it therefore ought by no means to be extended by implication, so as to comprehend what would not naturally fall under it. It is true, indeed, that when a superior astricts his feuders, the multure may be

be considered, in some measure, as part of the feu-duty; which must be diminished in proportion as the other is increased; but it surely cannot be seriously maintained, that Sir William Maxwell's predecessor would feu out his lands to the petitioners predecessors, at a lower duty than he would otherwise have done upon their agreeing to astrict the teind as well as the stock, while they should be allowed to possess and intromit with it, when it was in the titular's power, by insisting to draw the *ipsa corpora*, to deprive him the very next day of any benefit he could propose to himself by such astriction.

But though your Lordships should not now incline to go so far as you did in your interlocutor of the 27th of November last, when you found in general, that the teinds of the petitioners lands were not astricted to Sir William Maxwell's mill, it is humbly submitted, if the interlocutor now complained of does not go too far the other way, when it finds, that the petitioners are not intitled to any deduction from their thirlage, on account of the teind. If the college, instead of meal, insist that the petitioners shall pay them so many bolls of oats, it would surely be extremely hard, to make them grind the whole of their own corns for the benefit of the thirl, and purchase oats elsewhere, to satisfy the college. They therefore apprehend, that, at any rate, your Lordships will be of opinion, that the tithe is only astricted so far as the petitioners shall find it necessary to grind it into meal; and that this astriction must fly off how soon the present use of payment by rental-bolls on meal is departed from.

May it therefore please your Lordships, to alter your interlocutor of the 26th of June last; and to find, That the tithes of the petitioners lands are not astricted to Sir William Maxwell's mill; or at least to find, That the said tithes are only astricted so far as the petitioners shall find it necessary to grind them into meal.

According to justice, &c.

ALEX. WIGHT.